Supreme Court, U

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No. 93-124

In the Supreme Court of the United States

OCTOBER TERM, 1993

PETER R. MICK AND DONALD C. BECK, PETITIONERS

v.

RESOLUTION TRUST CORPORATION, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether this Court's decision in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), and 12 U.S.C. 1823(e) (Supp. IV 1992) bar petitioners' claims that they are not liable on promissory notes held by the Resolution Trust Corporation as conservator for a failed financial institution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is unreported, but the judgment is noted at 993 F.2d 878 (Table). The order of the district court (Pet. App. B1-B30) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1993. The petition for a writ of certiorari was filed on July 19, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 25, 1986, petitioners purchased two condominium units in Atlantic City, New Jersey, in return for which they executed two promissory notes payable to U.S. Capital Mortgage Corporation, each in the amount of $283,200, secured by mortgages on the condominium units. In early July, the mortgages and notes were assigned to Irving Savings and Loan Association. Although the building in which the units were located apparently was operating as a hotel at the time petitioners purchased the units, local authorities subsequently closed the operation because of its failure to comply with local laws. See Pet. App. B3-B5; Pet. 8.

Petitioners subsequently ceased making the requisite monthly payments on the notes, and Irving Savings and Loan responded by instituting foreclosure proceedings in the New Jersey state courts. Before those proceedings were completed, the Resolution Trust Corporation (RTC) was appointed receiver of Irving Savings and Loan, some of the assets of Irving Savings and Loan (including the notes in question) were transferred to a new institution, Irving Federal Savings and Loan Association, and the RTC was appointed conservator of Irving Federal. In due course, the RTC as conservator of Irving Federal removed the foreclosure actions to federal court and instituted a separate action to collect on the notes. See Pet. App. B5-B6.

2. Petitioners contended that they were not liable on the notes because they believed that Irving Savings and Loan had been involved with U.S. Capital in a scheme to defraud petitioners into purchasing the condominium units by persuading petitioners that the

units could be operated as hotel units. See Pet. App. B7. The district court rejected that argument and entered summary judgment for the RTC as conservator. *Id.* at B1-B30. The court reasoned that the claims were barred by *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), and 12 U.S.C. 1823(e) (Supp. IV 1992). Pet. App. B11-B28. As the district court explained, petitioners' primary argument was that their reliance on the oral representations was not impermissible because a provision in the loan documents stated that petitioners would be entitled to "assert their claims with defenses against the holder," Pet. App. B16. The court acknowledged that the clause on which petitioners relied satisfied the requirements of *D'Oench, Duhme* and Section 1823(e), but concluded that the relevant question was whether the representations that allegedly defrauded them satisfied those requirements. Because the representations that allegedly defrauded petitioners were completely absent from any documents in the records of the failed institution, the district court refused to allow petitioners to interject them as a bar to the RTC's suit to collect on the notes. Pet. App. B19-B22.

3. The court of appeals affirmed in a brief opinion citing *D'Oench, Duhme* and *Langley* v. *FDIC*, 484 U.S. 86 (1987). Pet. App A1-A6.

ARGUMENT

Petitioners renew their argument that the terms of the loan documents permit them to refuse payment of the notes on the basis of representations that are not reflected in any of the documents contained in the records of the failed institution. Pet. 11-20. That claim is inconsistent with both 12 U.S.C. 1823(e)

(Supp. IV 1992) and this Court's decision in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942). As this Court explained in *Langley* v. *FDIC*, 484 U.S. 86 (1987), an individual

> who signs a facially unqualified note subject to an unwritten and unrecorded condition upon its repayment has lent himself to a scheme or arrangement that is likely to mislead the banking authorities, whether the condition consists of performance of a counterpromise (as in *D'Oench, Duhme*) or of the truthfulness of a warranted fact.

Id. at 93. Petitioners' reliance on the alleged representations that the condominiums they purchased could be used as hotel units is barred by the same reasoning.

Nor can petitioners evade that reasoning by relying on terms of the loan documents that allow them to assert against assignees of the loan documents any defenses they had against the original lender. That argument rests on the premise that the RTC's rights are no greater than the rights of any ordinary commercial assignee of the loan documents. *D'Oench, Duhme* and Section 1823(e) rest on a contrary premise, that federal regulatory authorities are in fact not subject to defenses that could be asserted against the failed institution, unless those defenses are, among other things, set forth in documents in the files of the failed institution. Hence, as the district court explained in detail (Pet. App. B19-B22), the relevant question is whether the agreement on which petitioners rely—that their obligation to pay the notes is conditioned on the condominium units being usable as hotel units—appears on the face of the loan documents in the records of the failed institution.

Because it does not, petitioners cannot press that defense against the RTC as conservator for the failed institution.

Finally, petitioners' reliance (Pet. 15) on *Howell* v. *Continental Credit Corp.*, 655 F.2d 743 (7th Cir. 1981), is misplaced. In that case, a lessee argued that it was not obligated to pay rent under a lease that had been assigned to the FDIC's predecessor, based on the failure of the lessor to acquire title to the leased property. The Seventh Circuit accepted that argument, relying on clauses of the lease that required the lessor to obtain and maintain title to the leased property. Based on those clauses, the court concluded that the defense "arises directly and explicitly from the provisions of the leases which were in the bank's files and which the FDIC now seeks to enforce." *Id.* at 747. No such conclusion could be drawn from the record in this case.*

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* Petitioners' reliance (Pet. 13) on the terms of a master deed covering the premises is misplaced. The reference in the lease to the master deed's legal description falls far short of an incorporation by reference of all the terms of the master deed. In any event, even petitioners do not go so far as to suggest that the master deed provided that the lessor had an obligation to ensure that governmental authorities did not interfere with use of the premises as a hotel unit, much less that the obligation of a purchaser of a unit to make payments on a promissory note issued to a third party would be conditioned on the legality of using the premises as a hotel unit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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